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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1586

DOROTEA ZALDIVAR V. DE TENORIO, ET AL.,
Petitioners,

vs.

H. E. McGOWAN, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY BRIEF OF PETITIONERS

The salient points have been covered in the petition, but there are some aspects of the response which seem to call for reply.

This stems in part from the open admission, or more precisely the assertion, that Hamilton was claiming title adversely, i.e., with hostility, toward his brother and then toward his brother's widow, but secretly so, awaiting the passage of time.

This admitted mental attitude of secret hostility has a significant bearing upon the equities of the case, which equities, in turn, define to some degree the minimum reach of the "most constant protection and security" vouchsafed by Article I of the Honduran Treaty to the nationals of each country.

As the Court readily can see from Respondents' inflammatory "Conclusion", there is an acute outcropping of prejudice which, in some degree, is also articulated, albeit in a more temperate tone, in Judge Coleman's majority opinion.

Mrs. Tenorio's rights are equated in the argument with that of "oil sleuths" who "unearthed" the aliens and "became extremely solicitous of their welfare," etc., an argument which had its effect upon the author of the majority opinion of the Court of Appeals.

Compare Judge Coleman's language:

> ". . . There was no effort to enforce the Treaty rights until an oil well had been brought in, whereupon the Treaty was dusted off in an effort to scramble the title. . . ." (Apx. A43)

With deference, when invocation of a Treaty of Friendship which grants to the nationals "the most constant protection and security" for their properties is twisted by construction into a "dusting off" process in "an effort to scramble the title," then, we submit, it is time for this Court to take a firm hand in the matter, because this hostility toward the treaty claims of federally favored aliens undermines the spirit and ignores the letter of such treaties.

It is quite true that the lessees of Mrs. Tenorio sought her out and informed her of her rights for selfish reasons,

just as Hamilton McGowan remained silent and secretly claimed the land for his own for selfish reasons. The difference is that Mrs. Tenorio's oil lessees seek to protect her retained royalty rights along with their own leasehold rights, but McGowan and his own lessees, on the other hand, seek to destroy those rights, claiming that Mrs. Tenorio's ignorance and McGowan's concealment and secret hostility are enough to turn the trick. In any case, the question is: Should Mrs. Tenorio, as a Treaty beneficiary, suffer prejudice by reason of the selfish actions of others, whether such actions are friendly or unfriendly?

More precisely, does the imposition of this kind of prejudice satisfy the Court's obligation to accord to Honduran Nationals, under a liberal view of treaty claims, the "most constant protection and security" for their property and the further obligations to stand firmly in the way of any attempt by anyone to take that property "without due process of law and without payment of just compensation," as the Treaty plainly requires?

We respectfully submit that unless this Court acts now to re-establish the canon of liberal construction and to apply this in the broad area of property rights granted under Treaties of Friendship and Commerce, the spirit of fair dealings between nations under numerous such treaties will suffer a serious blow and the good faith of this nation could well become suspect as a result.

Fair notice and not designed concealment is the ingredient of due process of law, especially where, as here, the contest is with a fiduciary who now admits to an attitude of selfish but secret hostility all along. Hamilton's attitude of undisclosed hostility, as now brazenly admitted and even asserted in his brief before this Court, was described by Judge Godbold, dissenting, as being "*too*

strong for the nostrils of an able and experienced trial judge. It is too strong for mine as well." (510 F.2d at 103, here at Apx. A48).

It is certain that Mrs. Tenorio needed protection from such hostility. It is equally certain that the Treaty guaranteed at least this much in terms of "the most constant protection and security". We urge this Court to vitalize the Treaty in this very important aspect. Otherwise, the Treaty is left filled with high sounding but impotent words and the canon of benevolent liberal construction, as heretofore respected, is reversed in favor of a harsh one of forfeiture,—a result always abhorrent to equity, even apart from treaties.

Marshall v. *City of Vicksburg*, 82 U.S. 146, 15 Wall. 146, 21 L.Ed. 121 (1872), a case arising in Mississippi, states:

> "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either. Livingston v. Tomkins, 4 Johns. Ch. 415; 2 Store Eq. §1319." (5 Wall. at 149)

In *Memphis & Charleston R. Co.* v. *Neighbors*, 51 Miss. 412 (1875), it was held:

> "A court of equity declines to lend its aid to enforce a forfeiture. Judge Story lays down the doctrine broadly, 'that it will never enforce either a penalty or a forfeiture;' and adds, 'therefore it will never aid in the divestiture of an estate for a breach of a covenant on a condition subsequent, although it will often interfere to prevent the divestiture of an estate for a breach of covenant or condition. . . .'" (51 Miss. at p. 418)

The "condition subsequent" in this case was that the land be sold in three years, but the failure was not automatically to cause a forfeiture under terms of the treaty, because this term was mandatorily "*to be**" reasonably prolonged if circumstances render it necessary."

The majority panel of the Court of Appeals allowed for no circumstances other than affirmative and knowledgeable actions by the non-resident Honduran heirs within the three year minimum term, thereby importing stringent conditions of forfeiture which are not to be found anywhere in the Treaty and which find no support in equity and which flatly negate the protective guaranties of Article I of the Treaty.

On the other hand, the Treaty, to say the least, fairly admits of a different construction. The alternative construction would simply allow prolongation whenever such is reasonably necessary to carry out the promises of Article I of "the most constant protection and security" and "due process of law" and "just compensation." Given this as a permissible alternative construction, the decisions of this Court, exemplified by *Factor* v. *Laubenheimer*, 290 U.S. 276, 54 S.Ct. 191 (1933) and *Bacardi Corporation of America* v. *Domenech*, 311 U.S. 150, 61 S.Ct. 219 (1940), require its adoption in this case, because

> ". . . if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." (Citations omitted.) *Factor* v. *Laubenheimer*, 290 U.S. 276, 54 S.Ct. 191 (1933).

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*The term "to be" was used in lieu of a discretionary "may be".

CONCLUSION

We deal with a sensitive subject. The Treaty paves a two-way street. Like many others, the Honduran Treaty is called a "Treaty of Friendship." It embraces the Golden Rule. It borrows concepts of fair play from our own Constitution to guarantee just compensation and due process of law. The spirit is one of constant protection, security and friendship, not of concealment, hostility and forfeiture. It should be applied in this spirit, not grudgingly and narrowly, but liberally and broadly to assure, in practice, that "most constant protection and security" of which it speaks so eloquently and which the Nationals of each country have been led to expect in territories of the other.

Respectfully submitted,

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